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No. 762

In The

SUPREME COURT of the UNITED STATES

Term

Ellard G. Conn and Victor R. Conn,
D-B-A- Conn Structors — Petitioner

V.

The United States of America — Respondent

Petition for Writ of Certiorari to the
United States Court of Claims

For the Petitioner
Ellard G. Conn, partner in Conn Structors,
1607 Congress Bldg., Miami, Fla.

Petitioners pray that a Writ of Certiorari issue to review the Judgement of the U. S. Court of Claims in case No. 297-56, entered June 8, 1960.

Indulgence of the Supreme Court is asked to vary somewhat from the usual manner of preparing a petition for writ of certiorari. Petitioner is represented by it's partner, Ellard G. Conn, who is not an attorney, nor does he have legal training. Although he is aware of the saying that a man who represents himself, has a fool for a client; there is no alternative. The refusal of the Government to make the equitable adjustment ordered in the contract has taken away the livlihood and life savings. Consequently, there is no money to pay attorney's fees.

This petition is brought under rule 23, and jurisdiction is under rule 19, of the revised rules of the Supreme Court. The Supreme Court has power over the lower Courts when they have far departed from the accepted and usual course of judicial proceedure.

QUESTIONS FOR REVIEW: 1. Is the Commissioner system fair to all parties when the Court of Claims Judges do not receive an impartial and unbiased report from the Commissioner from which to make a decision?

2. Can the Court of Claims ignore in its decision the uncontradicted evidence in favor of petitioner?

3. Is the government required to execute the mandatory instructions stated in article 10 of the contract, ordering an equitable adjustment for changes based upon actual costs to the contractor less his estimated costs at the time of award?

4. Is there an implied warranty that the plans and specifications are adequate to build the finished product within the time and costs contemplated?

5. Does the government have to pay interest on funds collected in the Court of Claims or the Supreme Court?

6. Since it is well established in law that when a contract is ambiguous the construction is against the maker, is this also true for misleading information?

STATEMENT OF THE CASE: Petitioner entered into contract NOY 27276, with the government, on July 17, 1951. Claim A is for the indirect costs spent for difficulties and delays caused by respondent's changes. The original contract time was 270 days. The government extended the time by 319 days. Petitioner requests $197,148.00 as equitable adjustment, being the actual costs less the estimated costs, as ordered by the contract.

Claim C. The contract provides unit price payment for:103,000 cubic yards of borrow fill @$1.00; 57,000 cubic yards excavation $1.50 with measurements to be made from cross sections in place.

The Government added a compaction factor of 28.8% for the borrow fill and an expansion factor of 9.7% for the excavation materials in computing the bid quantities. The Petitioner is entitled to use the same methods and factors to compute the materials actually moved as the government used in arriving at the quantities to bid on. The change order provides in the first paragraph "you are directed to omit 40380 cy of borrow and 23448 cy of excavation." And in the third paragraph "Except as modified by Change A and this change, the terms and provisions of the basic contract shall remain in full force and effect." The only changes made by this Change order were to increase the unit prices for the cut and fill and decrease the amount of materials handled. The Government's excuse for not paying for the actual materials handled was that the Change order reformed the contract and that when the contractor signed the Change order he agreed that payment in full for the cut and fill had been made. The Petitioner submits that the wording of the Change order is crystal clear and that the terms and provisions of the original contract must remain in full force and effect during the life of the contract, therefore payment must be made accordingly.

MATERIAL TO QUESTION 1: Petitioner submits he was deprived of the independent judgement of the Court, because the decision was inconsistent with the evidence in the Findings of Fact; the Commissioner's report, which was adopted by the Court as the Findings of Fact, ignored the rights of the Petitioner for Claims A and C.

Petitioner urges that Court of Claims Commissioners should be fair and impartial and be careful to act with due regard for the rights of both parties. To this effect, (Needles, Court of Claims, 44994, May 1, 1944). "At the outset it should be stated that an officer who is given authority to decide specific matters under a contract, or to decide questions

of fact or all disputes arising under a contract, should consider and is required to consider, and act upon the particular matter or question before him fairly and impartially and with due regard to the rights of both parties to the contract." The Commissioner admits that he failed to comprehend the payment of $38,744.83 as sub-contractors direct cost and the compaction and expansion factors in Claim C. He also ignored or failed to recognize the uncontrovertible facts that Respondent shouldered full liability for the changes: The government acknowledged that there was greater stability to the soil than was contemplated by the specifications; ordered the contractor to drive each pile as a test pile for each succeeding pile; extended the contract time by 319 days for reasons not due to the contractors fault and stipulated that the costs were as determined by the government audit of the contractor's books. The unsubstantiated assertions and allegations made by Respondent against Petitioner are inconsistent with their actions in assuming liability and absolving Petitioner of any blame.

MATERIAL TO QUESTION 2: The Court of Claims decision is completely void of reference to; the mandatory provisions of contract article 10, which orders an equitable adjustment for changes and cites the method by which it should be made; Respondent's accentance of liability for the changes; Respondent's extension of the contract time by 319 days; the fact that no liquidated damages were assessed against the Petitioner; and the Respondent's stipulation, agreeing that the costs were as determined by government audit of the contractor's books and records.

MATERIAL TO QUESTION 3: The Petitioner signed the contract in good faith and supplied payment and performance bonds. In case of default or late completion, Petitioner and/or his bonding company were good for the loss. The contract provides a penalty

of $300.00 per day for late completion. For reasons not due to the fault or negligence of the contractor the time was extended by respondent by 60 days. Consequently, no liquidated damages were assessed. The Government is not [illegible] Sovereign in this matter. The Government has ethical moral and legal obligations to [illegible] by to the contract.

MATERIAL TO QUESTION 4: The [illegible] is that the maker of the contract is [illegible] and accountable for its construction. [illegible] this present is Controller's decision [illegible] August 10, 1948; "In case of plans and specifications furnished a contractor by the Government there is an implied warranty that they are sufficient to enable the contractor to [illegible] the product contemplated by the parties." The question included time and costs because both are considerations of the contract. They must therefore be considered together. Time is money. The longer it takes to do something, the more it costs.

MATERIAL TO QUESTION 5: The Respondent charges interest on delinquent payments due from contractors. What is fair for one should be fair for the other. What is sauce for the goose is sauce for the gander. Petitioner urges that because the Government is not Sovereign or Quasi-Sovereign in this matter, Petitioner is entitled to the same right to collect interest from Respondent as Respondent has to collect interest from the Petitioner.

MATERIAL TO QUESTION 6: The false and misleading information in the specifications could have been avoided if the Government has properly examined the site. The stability of the soil was a factor well within the Government's control. The condition of the soil did not change between the times that the specifications were written and the work was let. The direct consequences of this careless preparation of the specifications were the finding

of conditions which differed materially and radically from those promised by the specifications and plans. The contract time was extended by 319 days. The Court of Claims is inconsistent in their Judgement because in the Diamond case 45419 they held "It is unreasonable for the government to try and pay for late completion of the work by merely refraining from assessing liquidated damages, and not paying for the costs of the work due to their fault."

CONCLUSION: This is a unique situation. If it were not so tragic, it would be humorous. The Defendant pled guilty; but the Plaintiff was sentenced.

The Court held that on the basis of the evidence and the lack of evidence, the Petitioner's claims must be denied. This Judgement is entirely erroneous. The Court completely ignored and disregarded the uncontrovertible facts; of admission of liability by the Government for the changes; the orders to drive each pile as a test pile for each succeeding pile; the extension of time by 319 days and the stipulation that the costs were as determined by the Government audit of contractor's books and records.

It is submitted that the Petitioner performed in good faith beyond the requirements of the contract, that the Respondent ordered the performance as changed and received the benefit of it; that it is in fact and in truth extra work, duly ordered and performed for which the Petitioner should receive an equitable adjustment as ordered by contract article 10.

Pertinent to the extended time of 319 days for completion of the work is Comptroller's Decision B99759 February 14, 1951, "A construction contract provision for equitable adjustment of the contract in the event the contracting officer authorizes specification changes affecting the time required for performance, has reference to changes affecting the entire contract work, and, therefore, an extension of time

granted the contractor in connection with an authorization for extra work for a portion of the contracted project applies not only to that portion, but also to the entire contract. Liquidated damages chargeable under the contract in the event of delay of completion of the work would be assessed on the basis of delay in completion of the entire work as modified by the change orders."

The Stipulation for costs is binding and must be respected by Respondent. 83 C.J.S. Section 13, stipulations, is in part as follows: "As a general rule stipulations are conclusive as to all matters properly contained, and necessarily included therein, and which are an essential part of the stipulation, ordinarily a party will not be permitted to contradict a stipulation, even though it is contrary to the fact, and even though the stipulation affects the statutory and constitutional rights of the parties thereto. The court may dispose of a pending cause on the basis of a stipulation for the compromise and settlement of the issues thereof, and a stipulation is binding with whatever force and effect a proceeding in court may have."

The prestige of the United States has been seriously damaged because of the improper administration of contracts by the Respondent. There are many firms who refuse to bid on or negotiate work with the Respondent for fear of not receiving fair and equitable treatment as promised by the contract. Many firms who do bid add a contingency to take care of unforseen costs which might accrue because of the failure of the Respondent to abide by the contract.

The questions propounded here are vitally important to the administration of the Government because of the vast number of contracts written in the United States.

Serious injustice must result when there is no

judicial relief from erroneous decisions of the Court of Claims.

The actions of the Respondent in accepting full responsibility for the changes, extending the contract time and stipulating to the costs, most certainly speaks louder than mere unsubstantiated allegations and assertions.

The decision of the Court of Claims is directly in conflict with the tenet of the contract; is inconsistent with other decisions of the Court of Claims; and is diametric to the spirit and intent of ethical, moral and legal justice.

Here the improbable has become a fact. The innocent is suffering for the sins of the guilty. The Respondent has taken trivial items and blown them up, way out of proportion, in order to obliterate the issues. Ordinarily a man is innocent until proven guilty. Here the man is guilty even though proven innocent.

In view of the uncontrovertible facts absolving the Petitioner of responsibility, and the unqualified acceptance of liability by the Respondent and the crystal clear orders in the contract, the Petitioner respectfully requests the Supreme Court to review this matter and reverse the judgement of the lower Court.

Respectfully Submitted

For the Petitioner

Ellard G. Conn

Dated at Miami Dade County, Florida, this 20th day of February, 1961.

In the United States Court of Claims

No. 297–56

(Decided June 8, 1960)

ELLARD G. CONN AND VICTOR CONN, DOING BUSINESS AS CONN STRUCTORS v. THE UNITED STATES

Messrs. John L. Kiloullen and *O. P. Easterwood, Jr.* for the plaintiff. *Messrs. McNutt, Dudley & Easterwood* were on the brief.

Mr. John F. Wolf, with whom was *Mr. Assistant Attorney General George Cochran Doub*, for the defendant.

OPINION

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff partnership sues the Government for breach of contract. The plaintiff had a contract, dated July 17, 1951, to construct a large warehouse for the Navy at Cherry Point, North Carolina. In the course of the work, the soil conditions at the site were found to be much more stable than had been anticipated. In consequence, the numerous piles called for by the contract were greatly shortened, but the difficulties of placing them were increased. The amounts of excavation and fill were also reduced. The plaintiff claims that it was not equitably compensated for the difficulties and delays resulting from the changes in the piling, and that the measurement of the excavation and fill was not in accordance with the provisions of the contract.

Our findings show that on the basis of the evidence, and the lack of evidence, the plaintiff's claims above described must be denied.

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No. 762

In the Supreme Court of the United States

OCTOBER TERM, 1960

ELAND G. CONN AND VICTOR R. CONN, D/B/A CONN INSTRUCTORS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
WILLIAM H. ORRICK, JR.,
Assistant Attorney General,
ALAN S. ROSENTHAL,
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OPINION BELOW

The opinion (Slip Op. 1–5) and findings of fact and conclusions of law (Slip Op. 5–29) of the Court of Claims are not yet reported.[1]

JURISDICTION

The judgment of the Court of Claims was entered on June 8, 1960. A timely motion to amend and alter the judgment was denied on December 1, 1960. The

[1] Petitioner has not printed the opinion and findings of the Court of Claims. For the Court's convenience, we have filed with the Clerk nine copies of the printed slip opinion, containing also the findings of fact and conclusions of law.

petition for a writ of certiorari was filed on February 27, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTIONS PRESENTED

1. Whether the Court of Claims correctly concluded that two of petitioner's claims were not supported by the evidence.

2. Whether, in the absence of statutory authorization, petitioner was entitled to pre-judgment interest against the United States on its third claim.

STATEMENT

The petitioner partnership brought this action in the Court of Claims to recover sums to which it was allegedly entitled under a contract with the government. The court determined that petitioner was entitled to recovery on one of its claims and entered judgment for petitioner on that claim. The undisputed facts are as follows:

On July 17, 1951, petitioner entered into a contract with the Department of the Navy for the construction of a warehouse at Cherry Point, North Carolina (Slip Op. 5). It developed during the course of the work that the soil conditions at the site were much more stable than had been anticipated (Slip Op. 7). The result was that the piles called for by the contract were substantially shortened but the difficulties of placing them were increased (Slip Op. 8). Further, the amount of excavation and borrow fill was sharply reduced (Slip Op. 7).

In accordance with Article 10 of the contract (Slip Op. 21), adjustments were made in the contract to reflect the changed conditions. First, petitioner was awarded by Change Order J an increase in price of $62,007.44 for performing "all additional work in connection with piling due to changed conditions differing materially from those originally encountered and provided for in the drawings and specifications." (Slip Op. 11). On March 21, 1955, petitioner signed its acceptance of Change Order J although noting that it did not consider the accompanying payment voucher final (Slip Op. 26). Second, because of the reduction in the amount of excavation and borrow-fill, the contract price was reduced by $62,984.16 (Slip Op. 18).

Additionally, and unrelated to the matter of the soil conditions, $17,808.39 was deducted from the price paid petitioner. The basis for this deduction was the elimination from the contract requirements of a provision which the government claimed had required the installation of a five-inch layer of crushed stone, covered by sisal paper, to be placed under the concrete floor of the warehouse (Slip Op. 16).

On July 12, 1956, petitioner instituted an action in the Court of Claims asserting four claims, one of which was later withdrawn. Claim A was for $246,947.26[2] representing additional expenses and overhead incurred by plaintiff as a result of the disruption of its work schedule flowing from the changed piling conditions (Slip Op. 9–10). Claim B was for

[2] This claim was reduced at trial to $197,148 (Slip Op. 10).

$17,808.98, the amount deducted from the contract price because of the purported elimination from the contract of the crushed stone and sisal paper requirement (Slip Op. 7). Claim C was based on the assertion that the measurement of the excavation and borrow fill was not in accord with the terms of the contract and, hence, petitioner had been underpaid $13,931.48 (Slip Op. 19).

On June 8, 1960, the Court of Claims awarded judgment for petitioner on Claim B, without interest. It dismissed Claims A and C as not supported by the evidence (Slip Op. 1–4). The government does not seek review of the court's decision with respect to Claim B.

ARGUMENT

The holding of the Court of Claims that petitioner had not established Claims A and C turns on the particular circumstances of this case and presents no question of general importance. Moreover, that holding, and the court's further conclusion that petitioner was not entitled to interest on Claim B, are clearly correct. Review by this Court is, therefore, not warranted.

1. Petitioner's Claim A was based on the theory that the additional overhead and expenses allegedly incurred by it were attributable to delay occasioned by changed piling conditions. The court below recognized that the pile-driving delays constituted an initial disruption of petitioner's progress (Slip Op. 10). It concluded, however, that, both during a part of the pile driving and after that activity was com-

pleted, there were delays which "were the combined product of [petitioner's] inability to secure materials and [petitioner's] mismanagement." This conclusion rested upon express and detailed findings respecting (1) petitioner's difficulties in procuring reinforcing and structural steel and (2) numerous written complaints sent by the Contracting Officer to petitioner on the matter of its derelictions in the performance of the contract (Slip Op. 10–11).

The court also made reference to the fact that the government's payment to petitioner for "all additional work in connection with piling due to changed conditions differing materially from those originally encountered and provided for in the drawings and specifications" exceeded by $39,744.83 the amount petitioner paid its piling subcontractor (Slip Op. 11). Petitioner was unable to explain what this sum represented and the court took note of the government's claim that it was intended to cover damages attributable to changes in the piling work (Slip Op. 11–12). In this connection, the court found that the damages "even remotely established by [petitioner]" on Claim A fell far short of that figure (Slip Op. 12).

2. As already noted, when work on the contract was initiated, inspection disclosed that the soil was more stable than anticipated. Revised Change Order B therefore provided for the omission of 28,448 cubic yards of excavation and 40,380 cubic yards of borrow fill and, using the increased unit prices of $1.72 and $1.22, respectively, recommended by the Board on Changes, decreased the contract price by $62,984.16

(Slip Op. 18). Petitioner signed its acceptance of Revised Change Order B without apparent protest or reservation (Slip Op. 18). Thereafter, on May 12, 1953, the Contracting Officer advised petitioner that, based upon a compaction factor of 25 percent used in arriving at the original specifications and on earth work yardages computed by petitioner, a total of 96,617 cubic yards of earth had been moved, and unit prices were reduced to $1.65 for excavation and $1.15 for fill (Slip Op. 19).

The court found that, while the record was not clear on the point, petitioner was apparently paid on the basis of Revised Change Order B, rather than the reduced unit prices (Slip Op. 19). In any event, the court noted, petitioner would have received only $130.29 more under the earlier computation than it was entitled to under the Revised Change Order (Slip Op. 19).

Notwithstanding these considerations, petitioner now claims to be entitled to receive $13,931.48 more than the price fixed by Revised Change Order B, because in calculating the quantities the contracting officer did not take into account compaction factors in both cut and fill which the government had purportedly used in estimating the original quantities (Slip Op. 19). But, as the court pointed out, the only person who possessed special knowledge regarding the compaction factor was an employee of petitioner (Slip Op. 19). Although this employee was apparently in Baltimore, and the last session of the trial was held in Washington, he was not called as a

witness by petitioner (Slip Op. 19–20). While one of the partners of petitioner endeavored to testify on the matter, he was found to lack the necessary expertise (Slip Op. 19–20). Additionally, the court found it necessary to exclude certain exhibits offered by petitioner because they were unintelligible in the absence of an explanation by qualified witnesses (Slip Op. 20).

Petitioner does not here challenge either the court's findings respecting its partner's competence to testify or the ruling on the exhibits. Nor has it ever explained the failure of its qualified employee to testify. In these circumstances it is hardly in a position to complain of the ultimate determination of the court on the record before it that petitioner was fully compensated by Revised Change Order B for the excavation and borrow fill work performed under the contract.

3. Petitioner's claim to interest on Claim B is no more substantial (Pet. 5). Congress has not provided for pre-judgment interest on contract claims against the United States. It is beyond dispute that courts have no jurisdiction to award interest on a judgment or claim against the United States unless there is express statutory provision therefor. See *United States* v. *N.Y. Rayon Importing Co.*, 329 U.S. 654, 661; *United States* v. *Alcea Band of Tillamooks*, 341 U.S. 48, 49; *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585, 588.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.

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MARCH 1961.

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